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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

6 October 2014

**Case Document No. 3**

**European Council of Police Trade Unions (CESP) v. France**  
Complaint No. 101/2013

**RESPONSE FROM CESP**

**Registered at the Secretariat on 5 March 2014**







# European Council of Police Trade Unions

International Non-Governmental Organisation within the Council of Europe

Mr Branko PRAH  
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of Police Trade Unions

to

the Executive Secretary of the European  
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Council of Europe  
Directorate General of Human Rights and  
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Lyon, 5 March 2014

**Subject: Complaint lodged by the European Council of Police Trade Unions against France for the incorrect application of Articles 5 and 6 of the revised European Social Charter.**

**Ref.: European Council of Police Trade Unions (CESP) v. France  
Complaint No. 101/2014**

Dear Sir,

In a letter of 20 January 2014, the European Committee of Social Rights forwarded us the French Government's observations on our collective complaint of 10 June 2013, registered under the number 101/2013 and declared admissible in a decision of 21 October 2013.

You ask us to reply to the arguments put forward by the French Government.

## **1 – The alleged inadmissibility of the complaint**

The French Government, as it usually does, disputes the admissibility decision taken by the European Committee of Social Rights at its meeting of 21 October 2013. In support of its argument it asserts that:

- ✓ the military status of the members of the National Gendarmerie precludes the implementation of the rights enshrined in the revised European Social Charter (the Charter);
- ✓ the European Council of Police Trade Unions does not have competence because it deals only with police officers.

These two arguments are not founded in law and should be dismissed.

### **1-1 – The military status of members of the National Gendarmerie**

The French Government considers that “*the military status of the personnel of the National Gendarmerie is a matter for each state to decide according to how they wish to organise their armed forces. In France, the National Gendarmerie has been an integral part of the armed forces since its creation. The European Social Charter does not contain any provision in this field, especially given that Article 5 of the European Social Charter makes express provision for special rules for members of the armed forces*”. On this basis, it concludes that the complaint is inadmissible.

This argument cannot be accepted. Under no circumstances should the Committee rely solely on the status chosen by the French Government without raising the question as to what the real tasks of this body are. If it did not do so, it would be tantamount to allowing the French Government to disqualify all the staff under its responsibility by giving them military status when they have no specific tasks connected with the armed forces.

Consequently, it is the actual tasks assigned to the National Gendarmerie on which we should be basing ourselves.

As the European Council of Police Trade Unions argues in its Collective Complaint (No. 101/2013) – an argument which is not refuted by the French Government – practically all the tasks assigned to the members of the National Gendarmerie constitute police work.

The share of their time which is given over to military duties is very negligible, amounting to less than 3%.

Furthermore, the French Government itself acknowledges, in its observations (see paragraph 42) that “*the National Gendarmerie exercises its powers over 95% of French territory for the benefit of 50% of the population*”. These are not military duties but police work, carried out, like the work of the national police force, for the purpose of protecting people and property.

Given these circumstances, this argument has absolutely no weight in view of the real tasks of the National Gendarmerie.

### **1-2 – The articles of association of the European Council of Police Trade Unions**

Secondly, the French Government submits that since the articles of association of the European Council of Police Trade Unions do not give it competence to lodge a complaint as they state that its aims are to defend police officers, it is not admissible for it to intervene on the subject of the military status of members of the National Gendarmerie.

1° - For the same reason as that outlined above, it is not enough to base our examination on the status ascribed on its own authority by the French Government; instead we have to look at the actual tasks assigned to the National Gendarmerie.

On this issue, it cannot be disputed that the tasks assigned are police work.

2° - It should further be noted that the European Code of Police Ethics - Recommendation Rec (2001)10 of the Committee of Ministers to the member states of the Council of Europe - makes several references to the issue of freedom of association for all members of the police.

The appendix to Recommendation Rec(2001)10 on the European Code of Police Ethics provides a clearer definition of the scope of the said Code: “*This code applies to traditional public police forces or police services, or to other publicly authorised and/or controlled bodies with the primary objectives of maintaining law and order in civil society, and who are empowered by the state to use force and/or special powers for these purposes*”.

It should likewise be noted that “*The Code applies regardless of how such police are being organised; whether centralised or locally oriented, **whether structured in a civilian or military manner***”. It is stated that: “*Above all the rule of law requires that those who make, adjudicate and apply the law should be subject to that same law. In other words, the police should be subject to the self-same law that they apply and uphold*”.

In particular, mention is made of the fact that “*the European Social Charter and its case-law comprises important principles with regard to the social and economic rights of police personnel*”.

In "IV.4 Rights of Police Personnel", it is stated as follows:

**"31. Police staff shall as a rule enjoy the same civil and political rights as other citizens. Restrictions to these rights may only be made when they are necessary for the exercise of the functions of the police in a democratic society, in accordance with the law, and in conformity with the European Convention on Human Rights."**

In the explanatory memorandum of the recommendation, it is stated with regard to the above provisions that:

*"The Articles of this section are guided by the overall principle that police in an open democratic society should have the same rights as other citizens, to the fullest possible extent. This is an important element of the rule of law and of making the police part of the society it serves.*

*The rights covered by the European Convention on Human Rights (civil and political rights) apply fully to all citizens in member states, including those employed by the police. Some of these rights are 'absolute' in their character, whereas others may be derogated under special conditions. In this respect, reference is made to the extensive case law developed by the European Court of Human Rights.*

*The present Article emphasises that member states shall not deprive their police staff of any civil and political rights, unless there are legitimate reasons directly connected to the proper performance of police duties in a democratic state governed by the rule of law."*

On this basis, it cannot be disputed that the European Council of Police Trade Unions has competence to lodge a complaint.

## **2 – The merits of the French Government's arguments**

The French Government presents a whole series of arguments, which are all equally unjustified, as to why the members of the National Gendarmerie are not covered by the rights enshrined in Articles 5 and 6 of the Charter. None of these arguments can be accepted. To confirm this, one only has to examine each argument one by one.

### **2-1 – On military status**

The first argument put forward by the French Government is that the military status of members of the National Gendarmerie means that they are not covered by the rights enshrined in Articles 5 and 6 of the Charter. This argument does not stand up to scrutiny.

1° - As demonstrated above in the discussion on the admissibility of the CESP's complaint, the European Committee of Social Rights cannot restrict its examination solely to the status assigned by the French state to members of the National Gendarmerie and ignore the actual nature of the tasks carried out by these persons.

Moreover, as the French Government accepts, practically all of the tasks carried out by the National Gendarmerie amount to police work and the tasks linked exclusively to military matters account for less than 3%.

As a result, military status does not make it possible on its own to argue that staff covered by this status may not enjoy the rights granted by the Charter.

2° - A comparative analysis of the statuses of armed forces – whether or not they carry out policing tasks – shows that this status is not incompatible with granting some of the rights guaranteed by the Charter.

In Germany, after the Second World War, the legislators wished to make soldiers "citizens in uniform", whose rights could only be restricted to the extent that was strictly necessary. In accordance with their rights of association, Germany's military personnel set up a professional association, the *deutsche Bundeswehrverband* or German Federal Armed Forces Association, which gathers together 65% of the civil and military personnel of the *Bundeswehr* and their families. This is a private law association, which differs from a traditional trade union in that it has set itself the goal not only of defending the professional interests of military personnel but also of representing the *Bundeswehr* as an institution. The German Minister of Defence is a member of this association.

In Belgium, the Military Trade Union Law of 11 July 1978 sets down the rules on the relations between the authorities and the trade unions of the military personnel of the army, the air force, the navy and the military medical service. There are currently four military trade unions: three are traditional political unions (the CGSP, CSC Services Publics and the SLFP), as provided for by the Law of July 1978, and the fourth is an “apolitical” union set up pursuant to the Law of 21 April 1994 (the CGPM).

In Spain, the Implementing Act of 22 October 2007 grants the right of association to the Civil Guard, which is a police force with military status and is attached to the Ministry of the Interior, like the French National Gendarmerie. As a result of this law, it would seem that Spanish case-law safeguards the rights of the leaders of this trade union. For example, in January 2012, the Central Court cancelled six months’ suspended employment and pay imposed on four leaders of the Unified Association of Civil Guards (AUGC) for taking part in a demonstration in 2008 alongside trade unionists from the national police force, while pointing out that one of the demonstrators had also held a press conference in 2011, in which he had claimed that the state treated its military personnel “like ETA terrorists”.

In Great Britain, trade union rights and freedom of association are neither prohibited nor granted by the law for British military personnel. As a result they may join trade unions or civil professional associations to obtain legal support for example.

In Italy, the right to join a trade union is limited to military personnel with contractual status. However, they must also refrain from any militant activity when on duty, on military sites or when wearing uniform.

In the Netherlands, the first military trade union, the VBM NOV, was set up in 1901. There are now four military trade unions, representing 90% of Dutch military personnel. This right of members of the armed forces to form and join trade unions is based on the Dutch Constitution, which guarantees this right for all citizens. However, there are special restrictions on military trade unions such as restrictions on the right to strike. The role of the Dutch trade unions is to protect its members’ social and material interests, to take part in collective bargaining and to provide individual support.

In Portugal, Institutional Law No. 4 of 30 August 2001 revised the general article of the Law of 1982 on the rights of military personnel and introduced six new articles which establish the conditions in which military personnel may exercise certain fundamental rights (freedom of expression, rights of assembly, demonstration, association and petition). Furthermore, Institutional Law No. 3 of 29 August 2001 governs military personnel’s right of professional association. Currently, there is a trade union for the Republican National Guard (the Portuguese equivalent of the French National Gendarmerie) called the *Associação dos Profissionais da Guarda* (APG/GNR).

4° - In the light of the foregoing, the military status assigned by the French state to the members of the National Gendarmerie does not preclude the application to them of the rights set out in Articles 5 and 6 of the Charter.

## **2-2 – The defence of national territory**

In particularly bad faith, the French Government, confuses the issue and asserts that “military activities are crucial for the security of the country” (see paragraph 29 of the French Government’s observations). In so doing, it lumps the National Gendarmerie together with the traditional armed forces, namely the army, the navy and the air force, and attempts to place them on the same footing.

Yet the tasks allocated to the traditional armed forces have nothing to do with those assigned to the National Gendarmerie. The armed forces carry out practically no policing tasks in France, whereas this is the main task of the National Gendarmerie.

Furthermore, over time, several conflicts involving France have shown that the National Gendarmerie’s role in such situations is one of a military police, providing an internal police service within the armed forces, and that it is never given operational military duties, which are usually assigned to the traditional armed forces.

In an attempt to circumvent this flaw in its argument, the French Government asserts that the gendarmes were active in Afghanistan, in 2009 and 2013. The CESP does not dispute that members of the Gendarmerie were required to work in Afghanistan but it would point out that the only duties assigned to them were ones of training in police operations. In 2009, at France’s instigation, a European Gendarmerie Force was sent to Afghanistan to train members of the Afghan National Police (ANP). Since then, 1 300 French gendarmes have been posted temporarily in Afghanistan, either as instructors in the Afghan Police training centres in Mazar-e-Sharif and Wardak or as advisers on the Police Operational Mentoring Liaison Team, particularly in Kapisa, where France’s traditional armed forces were deployed.

Given these circumstances, it is quite clear that:

- ✓ practically none of the tasks carried out by members of the National Gendarmerie on national territory are military in nature;
- ✓ practically all of their time is given over to police work.

As a result, this argument is totally inoperative.

### **2-3 – The alleged risks of trade union disputes**

With particular bad faith and particular contempt for members of the national police force, the French Government does not hesitate to argue that if members of the National Gendarmerie were granted the rights provided for in the Charter, there would be a risk of a trade union dispute.

Initially, the French Government states (paragraph 30) that: *“it seems essential that in order to perform its duties, the National Gendarmerie continues to be subject to the demands in terms of discipline, readiness to serve, loyalty and neutrality which military status calls for”* before going on to state (paragraph 32) that *“given these circumstances, a trade union dispute could undermine the permanent nature and the proper functioning of the service because of the risk of doubts as to the justification for the orders which military personnel are required to carry out, thus weakening the military command structure”*, bringing it to the conclusion that *“military status ... seems essential for the requirements of a permanent public national defence service”*.

This argument cannot be accepted.

1° - If the subject of the French Government's argument is solely the traditional tasks of the armed forces, its assessment may seem well-founded at first sight. However, when we look at the situation of other employees of the French state who are needed for it to function properly and whose task is also to defend the Nation, it is clear that its reasoning is totally fanciful.

Clearly, national police officers and judges and public prosecutors have trade union rights such as those provided for in the European Social Charter but they do not have the right to strike - an exception which prevents any blockage of the services which are crucial for the proper functioning of the French state.

In addition, while other public servants who are vital for the proper functioning and defence of the state are granted the right to strike, such as hospital staff or civil protection officers, the state has the legal authority to requisition such employees when absolutely necessary.

Accordingly, granting some of the social rights enshrined in the Charter to members of the National Gendarmerie would not undermine *“the requirements of a permanent public national defence service”*.

It should also be pointed out that the French Government misrepresents the role of the National Gendarmerie when it says that it provides *“a permanent public national **defence** service”*. In making this statement, the Government's intention is to falsely relocate the activities of the National Gendarmerie in a context that has to be military in nature.

Yet, while the definition of *“defence”* definitely has a military aspect, it is not just a military matter. In reality, it covers all the tasks linked to protecting the integrity of the national territory and its inhabitants.

In the instant case, it cannot be disputed that the National Gendarmerie takes practically no part in defence tasks in the military sense, as 97% of its duties amount to police work.

Furthermore the 3% of military tasks which it does perform, do not necessarily involve activities linked directly to national defence.

Accordingly, contrary to what the French Government claims with the sole purpose of misleading the Committee as to its actual role, the National Gendarmerie is in no respect a guarantor of a permanent national defence service in the military sense.

2° - If the Government's assessment is aimed at police work, its reasoning is particularly scornful towards other officials carrying out policing tasks, particularly members of the national police force.

This is because the converse implication of its argument is that national police officers are undisciplined, not ready to serve, disloyal and prejudiced.



This contempt is made all the more unacceptable by the fact that it does not in the slightest reflect the actual situation.

3° - Lastly, it is somewhat surprising that the French Government refers to the risks of a trade union dispute to justify the maintenance of the strictly military status of the members of the National Gendarmerie and the decision not to grant some of the trade union rights established by the Charter. This argument also shows contempt for other forces carrying out policing tasks and is shown by events in the past and more recently to be mistaken.

It shows contempt because it implies that national police officers with trade union rights could interrupt their public service through industrial action. This is entirely untrue, both in law and in fact. In law, this supposition cannot be accepted because national police officers do not have the right to strike. In point of fact, ever since the establishment of the national police, there has never been a single concerted action by police officers which interrupted the public service.

This conclusion is also mistaken because recent events show that the military status without trade union rights which applies to members of the National Gendarmerie does not prevent the risk of "trade union"-type disputes.

This is confirmed by the fact that since the creation of the national police force in France, the only public demonstration – albeit **unauthorised** - organised by the staff of a military force or a police force was conducted by the members of the National Gendarmerie in 2001.

At the end of 2001, following an appeal launched on the first Internet site set up and run by a group of gendarmes' wives (*Femmes de Gendarmes en Colère*), large numbers of gendarmes – mostly non-commissioned officers – took part in protest marches or processions either marching in uniform or driving their official vehicles and carrying their weapons, throughout France and, in particular, on the Champs-Élysées in Paris, demanding better working conditions, more material resources, compensation for their very high working hours and additional staff. Despite the strict ban on strikes and demonstrations imposed by the French law because of their military status, these events actually amounted to the first strike by French gendarmes, not counting the strike of 13 August 1944, which took place in a very specific context.

Yet, this situation has never arisen in the national police force.

4° - In this context, the risk of trade union disputes cannot be put forward as justification for the fact that members of the National Gendarmerie do not enjoy some of the rights set out in the Charter.

## 2-4 – Consultation bodies

Lastly, the French Government, probably for want of any further argument, draws attention to the existence of consultation bodies within the corps of the National Gendarmerie in an attempt to justify the failure to grant the rights established by the Charter. For several reasons, this argument cannot be accepted.

1° - The autonomy of these consultation bodies is limited. As Chair of the Higher Military Council, the Minister has control over the organisation of their activities, whether this involves setting the agenda or dealing with the issues submitted for discussion. The agenda of the meetings of the national consultation bodies is a great source of dissatisfaction to all the military personnel who are members of these bodies or of the high command. The report of the combined forces working group sums up the general feeling well: *"the subjects of the audit feel that they take no part in determining the matters to be discussed ('agendas are imposed'), the agendas do not reflect their expectations (being 'far removed from grassroots concerns') and even that the authorities are purposefully 'swamping' them with statutory texts 'so as to limit the number of debates on staff conditions' "*.

2° - Furthermore while it is true that the personnel sitting on these bodies are elected by their colleagues, their candidatures do have to be approved by their superiors. This limits both the choice of candidates and their subsequent freedom to act.

3° - In addition, the personnel elected to these bodies do not have organisations providing them with the technical and legal back-up needed to deal with the complexity of French regulations on working conditions.

It is unrealistic to expect that under such appointment and working arrangements, simple gendarmes can take informed views on highly technical bills prepared by senior central government officials.

The dialogue between members of consultation bodies and central government is unbalanced. This contributes to the impression that the Councils are merely there to rubberstamp texts submitted by the Ministry.

4° - These varying factors show that such consultation bodies cannot compensate for the failure to grant the rights guaranteed by the Charter to the members of the French National Gendarmerie.

## **2-5 – Arrangements for the implementation of Charter rights**

Bearing in mind the actual tasks performed by the members of the National Gendarmerie, namely police work, there is nothing to prevent these officers from enjoying some of the rights enshrined in Articles 5 and 6 of the Charter when they are carrying out policing tasks and for these rights to be suspended when they perform duties linked solely with the armed forces.

Furthermore, as demonstrated above, several Council of Europe member states have granted their armed forces some of the rights set out in Articles 5 and 6. Consequently, there is nothing to stop the alternating implementation of these rights to the members of the National Gendarmerie depending on the actual nature of the tasks being carried out, namely whether they are policing tasks or military duties.

Moreover, when gendarmes are performing police work, there would be nothing to prevent the French Government from restricting the social rights granted to them by barring them from the right to strike, as is already the case for national police officers.

The restrictions on the exercise of freedom of association for military personnel including the National Gendarmeries go even further than those that may be imposed under ordinary law.

As noted by Ms Clara Bacchetta (in "*La liberté d'association professionnelle dans les armées*" ("Freedom of professional association in the armed forces") in the periodical *Les Champs de Mars*, No. 9, 1<sup>st</sup> quarter 2001), even Prefects may set up associations to defend their interests. This leads her to the conclusion that "*active military personnel are the only members of French society who are denied the enjoyment of the essential right of freedom of association whenever the defence of their professional interests is at stake*".

In 2011, the Commission on National Defence and the Armed Forces of the French National Assembly concluded that in the light of social developments in French society, the armed forces could not remain excluded from society indefinitely. It added that "*no matter how dedicated and involved they are, commanding officers cannot deal on their own with all the preoccupations of their subordinates*". In conclusion, their 15<sup>th</sup> proposal was entitled "*allowing military personnel to join associations for the defence of their rights*".

This situation cannot last, especially as it has no legal or factual basis.

## **III - Conclusion**

Clearly, in the light of all the above, the collective complaint lodged by the European Council of Police Trade Unions and declared admissible on 21 October 2013 is particularly well founded in law and in fact.

Consequently, all the French Government's arguments should be dismissed.

It must therefore be declared that France is violating the Articles of the Charter cited above.

In addition, France should be asked to bring its regulations into conformity with the provisions of Articles 5 and 6 of the Charter which they currently violate so that the members of the National Gendarmerie may enjoy the rights guaranteed by the Charter.

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